Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?

Abstract

Parties in international arbitrations often raise res judicata challenges before arbitral tribunals and courts. But neither parties nor the tribunals or courts have been clear as to whether these challenges affect the admissibility of a claim or the tribunal’s jurisdiction. A close analysis of arbitral awards and court decisions that address res judicata challenges reveals, however, that the question need not be as complicated as parties, tribunals, and courts have made it.

1. Introduction

While the legal principle of res judicata is widely recognized in domestic laws and by international tribunals, its scope and meaning are unsettled topics. Authors, courts, and tribunals have extensively grappled with the meaning of res judicata’s scope in international arbitrations. As the legal effect of res judicata — whether the doctrine implicates jurisdictional or admissibility problems — has not received the same intention. This article seeks to fill that gap by analysing whether res judicata objections in international arbitrations are objections that go to a tribunal’s jurisdiction or to the admissibility of a claim.

After Section I gives this brief introduction, Section II of the article provides some background information on the legal principle of res judicata. Section II analyses the basic differences between jurisdictional and admissibility objections. Section III analyses how res judicata is treated by legislation, courts, and tribunals. Section IV reveals that though treatment appears to be far from uniform on its face, legislation, courts, and tribunals have needlessly complicated this issue. Section V analyses the problem and offers a solution — that res judicata neatly fits within the category of admissibility objections and that trying to push it into a jurisdictional objection is like trying to fit a square peg into a round hole. Finally, section V briefly concludes the article.

2. Background

2.1. Res judicata approaches in international arbitration by different legal systems

Res judicata is a widely recognized, basic feature of both domestic and international legal regimes. As a general principle of law, res judicata stands for the proposition that a court's or tribunal's conclusive adjudication of a conflict is final and binding on the subject matter in dispute and cannot be litigated by a subsequent court or tribunal. This general understanding of res judicata applies to both court judgments and arbitral awards.

Inherent in this general principle is the notion that res judicata has both positive and negative effects. The positive effect is that once a judgment or award is made, it becomes final and binding on the parties and should be enforced. This positive effect of res judicata is largely uncontroversial and often expressly recognized by domestic legislation, arbitral institutional rules, and international conventions. Res judicata’s negative effect refers to the idea that the subject matter of a dispute, which has finally been resolved in a judgment or award, cannot be litigated in a subsequent forum. While the existence of this negative effect is widely accepted under domestic and international legal regimes, the definition and scope of this aspect diverges amongst different legal systems.

In common law countries, res judicata principles are generally found in and developed through case law. The concept of res judicata is generally broader in common law jurisdictions than in civil law jurisdictions. For example, common law jurisdictions often give res judicata effect to the reasoning of previous decisions and not simply to the ultimate determination itself. More notable, however, both the English and American common law systems recognize claim preclusion and issue preclusion and do not limit res judicata to mere determinations of legal and factual questions. Under 'claim preclusion', a party is prohibited from relitigating or denying a claim that a court or tribunal has finally and conclusively resolved on the merits. The claim generally must be between the same parties, rely on the same legal basis and arise from the same factual circumstances. Under 'issue preclusion', a party in a subsequent legal proceeding is bound by a previous court’s or tribunal’s determination of a specific issue.
Many common law jurisdictions, including England, the United States, India, Australia, and New Zealand, have confirmed that res judicata principles apply equally to court decisions and arbitral awards. Although not codified in domestic legislation, common law court precedent establishes that the principles of claim and issue preclusion, as applied to the courts, also apply to arbitral awards.

### 2.1.2. Civil Law

Res judicata, as applied in domestic legal proceedings, can be found in the civil codes in many civil law countries in Europe, the Middle East, and Latin America. Res judicata's scope is generally narrower in civil law countries than in common law countries. For instance, its application is limited to relitigating claims rather than extended to granting preclusive effect to issues. The exact scope of res judicata varies across civil law countries, however. For example, Germany and Switzerland limit the principle to actual prior determinations and do not give res judicata effect to a court's or tribunal's reasoning, but France, the Netherlands, Belgium, and Italy give some preclusive effect to the reasoning as well.

In determining whether res judicata applies, civil law countries strictly apply a 'triple identity test'. The triple identity test requires identity of the following: (1) the object, (2) the grounds on which the claim is based, and (3) the parties. The identity of the object requires that the relief sought in the different proceedings be the same. The identity of the grounds requires that a later proceeding be based on the same legal basis as a previous claim. The identity of parties prohibits unrelated third parties from benefitting from or being restricted by a prior decision or award. The definition of 'identical parties' differs in different civil law systems.

As in common law countries, domestic res judicata principles apply to arbitral awards in civil law countries. Many civil law countries have even codified the application of res judicata principles for arbitral awards.

### 2.1.3. International Law

Res judicata is also extensively embraced as a principle of international law. International courts, such as the International Court of Justice (ICJ) and European Court of Justice (ECJ), repeatedly rely upon the principle. As do international arbitral tribunals. More than ninety years ago, in the well-known Chorzow Factory Case, Judge Anzilotti famously declared that res judicata is one of the 'general principles of law recognized by civilized nations'.

This widely accepted principle applies under international law when four requirements are satisfied: proceedings that: (1) involve the same relief, (2) involve the same grounds, (3) are between the same parties, and (4) were previously conducted before an international court or tribunal. The first three requirements are similar to the 'triple identity test' employed by civil law countries. The fourth requirement means that domestic court decisions have no legally binding effect on international dispute settlement bodies.

As a 'general principle of law recognized by civilized nations', there can be little doubt that domestic and international courts within the same legal order will recognize and enforce res judicata principles.

### 2.1.4. International Arbitration

Rules, laws, and treaties that govern international arbitration practice also embrace the concept of res judicata. For instance, arbitral institutions' rules give binding effect to awards and impose a duty on parties to carry out awards without delay. Similarly, Article 35(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which has been adopted as the basis of arbitration acts in sixty-six countries, states that arbitral awards are binding on the parties. Perhaps most significantly, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’) requires signatory countries to recognize and enforce res judicata effect of foreign arbitral awards.

Within this legal framework, international arbitration practice recognizes the res judicata effect that prior arbitral awards carry. As within many domestic legal systems, however, the res judicata effect of an arbitral award is limited to the specific question addressed by the prior award. Limiting res judicata to instances where specific questions are answered consequently limits the res judicata effect of some jurisdictional decisions. For example, because a finding of negative jurisdiction is not a decision on the merits of the dispute, a subsequent tribunal with jurisdiction is not precluded by res judicata from rendering a decision on the merits.

Refraining from extending a negative jurisdiction finding to a decision on the merits of the dispute is important for two reasons. First, if a negative jurisdiction finding gives res judicata effect to any subsequent resubmission of the dispute on the merits, the claimant might be left without a forum to seek relief. For example, under North American Free Trade Agreement (NAFTA) Chapter 11 arbitrations, a claimant must first waive its right to pursue relief in domestic courts before it may pursue treaty relief in arbitration. Therefore, if a negative jurisdiction finding in NAFTA cases precludes a subsequent arbitration on the merits, the claimant has also waived any right to relief in the courts and could be left without a forum for relief. Second, res judicata claims are not the only claims where parties, courts, and tribunals routinely
conflates the distinction between jurisdictional and admissibility objections. Tribunals often issue decisions on ‘jurisdiction’ in which they affirm or deny jurisdiction based on objections regarding preconditions to arbitration, like time limits or multi-tier dispute resolution clauses, mootness, and ripeness. [48] As Prof. Jan Paulsson has explained, [49] page 2007, however, these objections raise questions of admissibility and are improperly treated as jurisdictional defects. [50] To extend the res judicata effect of a negative jurisdictional finding to the merits of a dispute, especially when the ‘jurisdictional’ finding could, in reality, be an admissibility finding, extends the principle of res judicata too far.

Accepting that findings on arbitral jurisdiction do not carry a res judicata effect on the merits of a dispute in international arbitration, the limited question of this article is clear: do findings on the merits of a dispute have res judicata effect on the jurisdiction of a subsequent arbitral tribunal? Or, do such findings only affect the admissibility of a claim before an otherwise competent arbitral tribunal? By clarifying this distinction, arbitral tribunals will have a clearer guideline on how to resolve these challenges. Moreover, parties and arbitral tribunals will have more predictability from courts that are asked by parties to review these determinations.

2.2. Jurisdictional and admissibility challenges: why the distinction matters

Before proceeding to examine whether res judicata challenges in international arbitrations affect jurisdiction or admissibility, it is necessary to understand the distinction between jurisdictional and admissibility challenges and why this distinction matters.

2.2.1. Difference Between Jurisdictional and Admissibility Challenges

In a domestic court, a judge’s jurisdiction to resolve disputes comes from national legislation and constitutions, but in arbitration proceedings, a tribunal derives its jurisdiction to resolve a dispute from the consent of the parties. [51] The foundation on which the arbitration rests, therefore, is the parties’ consent. [52] When a party objects to an arbitration, it raises an objection to an arbitral tribunal’s jurisdiction, the challenge goes to the arbitration’s core – the scope and existence of the parties’ consent. [53] This consent can be found in an arbitration agreement, submission agreement, or [54] page 2007, [55] international treaty. [56] A challenge to a tribunal’s jurisdiction alleges that the consent contained in any of these documents is non-existent, invalid, not within the scope of the dispute in issue, or in violation of public policy. [57] In short, jurisdictional challenges ask the basic question of whether the parties consented to a particular tribunal’s authority. [58]

Because consent to arbitration is consent to settle a dispute in a private forum, rather than the default forum of domestic courts, jurisdictional objections specifically challenge the forum in which a dispute has been brought. [59] If a party’s objection challenges a particular tribunal as the appropriate forum to resolve a dispute, rather than challenges a particular claim, the objection is jurisdictional. [60]

However, where a party raises an admissibility challenge in international arbitration, the party does not contest that a particular tribunal is the proper forum to try a claim. Rather, admissibility challenges are about whether a claim is defective in some way. [61] An admissibility objection takes issue with the claim itself and alleges that the claim should not be heard in any forum. [62] In Prof. Jan Paulsson’s article evaluating the differences between jurisdictional and admissibility objections, he lists timeliness, conditions precedent (such as conciliation provisions), waiver of claims, mootness, and ripeness as admissibility issues that fall within this distinction in challenges. [63] Because admissibility challenges affect a claim rather than the forum, admissibility challenges will typically be raised after jurisdictional challenges. [64]

2.2.2. Why the Distinction Matters

While a jurisdictional challenge may precede an admissibility challenge in time, a party’s goal in raising a jurisdictional or admissibility objection may effectively be the same. Both objections seek to prevent a tribunal from making a finding on the merits of the dispute. [65] Labelling an objection as jurisdictional or admissibility, however, has important consequences in international arbitration. First, the label may determine a number of practical matters, such as who bears the burden of raising the objection, [66] the order in which the objections should be raised, [67] whether the objection is of a procedural or substantive nature, and which law applies to resolve the objection. [68] Second, labelling an objection as jurisdictional or admissibility determines whether the decision on the objection carries res judicata effect. Decisions on jurisdiction may have res judicata power; decisions on admissibility do not. [69] Third, and perhaps most importantly in international arbitrations, the label determines the type of review that a court later has over the tribunal’s decision. [70] If the challenge is jurisdictional, the courts have final review; if the challenge goes to admissibility, the courts should have no review of the tribunal’s decision. [71]

While arbitrators have the authority to make an initial determination of their own jurisdiction under the legal principle of competence-competence, [72] domestic [73] page 2055, courts in the country of the arbitral seat or where enforcement of an award is sought possess the final determination of whether a tribunal had jurisdiction over a particular dispute. [74] Such a court may undertake a full review of the jurisdictional challenge and need not give any effect to the jurisdiction determination by an arbitral tribunal. [75] In contrast, if a challenge is in the nature of an admissibility objection, the court should make no review of the tribunal’s decision on the issue. Because admissibility objections strike at the merits of the dispute, [76] as embodied in the New York Convention and in many states’ arbitration laws, state courts will refrain from conducting a substantive review of the merits of a dispute when a party seeks
annulment, recognition, or enforcement of an arbitral award. 

Consequently, courts do not have the authority to review a tribunal's findings on issues related to a dispute's merits, such as admissibility challenges.

Labelling a challenge as jurisdiction or admissibility not only defines how a court may interfere in an arbitration, but also when the court may intervene. Under Article 2(3) of the New York Convention, signatory countries promise to enforce valid arbitration agreements to resolve international commercial disputes. 

A national court, therefore, must decline jurisdiction and refer a case to arbitration where there is a valid arbitration clause, as defined by Article 2(1) of the New York Convention. A court then, upon a party's request, may review the validity of the arbitration agreement and determine whether an arbitral tribunal has jurisdiction at the beginning of the arbitration. 

However, while a court should make no review of a tribunal's admissibility decision, a party that attempts to seek judicial review of an admissibility decision could likely do so after the tribunal issues its final award. But a party that raises an objection to a tribunal's exercise of jurisdiction could obtain judicial intervention immediately upon initiation of an arbitration.

A final implication of this third reason for the importance of distinguishing between jurisdictional and admissibility challenges is that the determination affects which party can challenge a tribunal's finding on the specific objection. If the objection is a jurisdictional challenge, the party who loses the jurisdictional debate is the only party that should be allowed to ask a court to review the tribunal's determination. If the objection goes to admissibility, however, neither party should be allowed to ask a court to review this determination because merits determinations are not subject to court review. Nonetheless, in order to make a finding that an objection is one of admissibility, the tribunal must also assert its jurisdiction to make such a finding. As a consequence, the respondent could potentially challenge the tribunal's assertion of jurisdiction in rendering its decision on admissibility before a competent court.

Classifying an objection as either a jurisdictional or admissibility challenge therefore affects the parties to an arbitration, an arbitral tribunal, and a reviewing court. By understanding the nature of the objection, the parties will know when to bring the objection, who should bring the objection, the legal standards to assert, and the basis of review of a tribunal's decision on the objection, if any. For the tribunal, understanding the distinction allows the arbitrators to apply the proper law, anticipate possible challenges to their decision, and allocate the burden of proof. Courts that make a clear distinction between jurisdictional and admissibility objections create certain standards of review for challenged arbitral awards.

As discussed in the next section, these consequences apply to res judicata challenges in international arbitrations and demonstrate the need to clarify how parties, tribunals, and courts treat such challenges. Courts and tribunals faced with these challenges confuse the issue by referring to res judicata objections as both jurisdictional and admissibility problems, or, worse, sometimes addressing the challenges as a non-descript 'bar' to further proceedings. As the international arbitration community continues to desire increased certainty and harmonization in national laws and court review, giving parties, tribunals, and courts a clarified standard of how to classify res judicata challenges meets this demand and instils greater predictability in the resolution of international disputes.

3. Analysis of the Problem

Classifying a res judicata challenge as a jurisdictional or admissibility objection has practical consequences. Knowing this classification is, therefore, important in international arbitrations so that parties understand how to properly bring or resist a res judicata challenge and can anticipate the consequences of such an objection. A party guessing how a court or tribunal will classify such a challenge faces a difficult task, however. Courts and tribunals are inconsistent, inaccurate, and vague in their terminology and treatment of res judicata challenges. This section analyses the different treatment of res judicata objections in international arbitrations by examining laws and decisions (1) that have assessed the objection as an admissibility problem and (2) those that have treated the objection as a jurisdictional problem. This section also analyses a third treatment of res judicata problems, as (3) a problem of neither admissibility nor jurisdiction. Examination of the different approaches reveals varying practical consequences for parties, which inject uncertainty and confusion into international arbitration. But the analysis in this section also reveals that the uncertainty and confusion is unnecessary. While the terminology used to resolve res judicata challenges may vary across jurisdictions, as the subsequent section will explain, the practical outcomes and actual treatment are not all that different.

3.1. Res judicata as an admissibility problem

A number of courts, tribunals, and jurisdictions have concluded that res judicata challenges are admissibility objections in international arbitration. The courts in these jurisdictions refuse to review a tribunal's determination on the res judicata challenge and find no defect in the tribunal's jurisdiction.

Specifically, French and a number of US courts have treated res judicata as an admissibility issue. For instance, in Chiron Corp. v. Ortho Diagnostic Systems [1995] the US Ninth Circuit Court of Appeals held that res judicata challenges are for arbitrators, and not for courts, to resolve. Recall that issues that are for arbitrators and not for courts to resolve are those issues that strike at admissibility, whereas jurisdictional problems are for courts to ultimately resolve.

In Marriott International Hotels, Inc. v. J.N.A.H. Development S.A., the Paris Court of Appeal rejected an application for annulment of an arbitral award based on, amongst other challenges, the
applicant’s res judicata claim. In this case, a landowner (JNAH) entered into agreements with Marriott International Hotels, Inc. (Marriott) for the construction and management of a hotel. The agreements contained arbitration clauses providing for International Chamber of Commerce (ICC) arbitration. A dispute arose and Marriott initiated arbitration, requesting an award declaring that it had not complied with the contract. The arbitration resulted in a 2003 award that rejected Marriott’s claims and partially upheld JNAH’s counterclaim for damages. Marriott initiated another arbitration in 2005, which resulted in an award granting further damages for JNAH. Marriott sought to have the award set aside before the Paris Court of Appeals.

Marriott based its annulment argument on a number of grounds under section 1502 of the French Code of Civil Procedure. Marriott specifically raised a res judicata challenge under section 1502(1) of the Code, which allows annulment of an award where an arbitrator renders an award in the absence of an arbitration agreement or on the basis of a void or expired arbitration agreement. Marriott argued that the arbitration agreement had expired upon the award in the first arbitration and that JNAH was prevented from initiating new proceedings by the doctrine of res judicata.

In arguing that the tribunal had no power to render the second award, Marriott thus asked the court in the set aside proceedings to treat the res judicata challenge as an objection to the tribunal’s jurisdiction and to conduct a full review of the tribunal’s determination on this point. The Paris Court of Appeals, however, refused to conduct such a review and expressly stated that a res judicata objection raises a question of admissibility of a claim before a tribunal. Consequently, the courts cannot review a tribunal’s factual and legal conclusions regarding that issue.

Interestingly, however, the Paris Court of Appeals noted that a res judicata objection could create a basis to annul or refuse enforcement of an award under section 1502(5) of the French Code of Civil Procedure, which provides for annulment of an award that is contrary to international public policy. The court explained that such a situation would arise if a second arbitral award contradicts a previous arbitral award that is enforceable in France. Some level of court review is necessary for res judicata challenges, therefore, when a challenge implicates violation of international public policy under French law. It is not clear from this case, however, what a French court would do if confronted with this problem. The Court of Appeals and the French Code of Civil Procedure suggest that a reviewing court would still not undertake a substantive review of the tribunal’s decision on the res judicata challenge. Rather, the French court would simply annul or refuse to enforce an award that conflicts with another.

In the jurisdictions that have classified res judicata as an admissibility problem, the tribunal’s decision on the issue is respected, and a court’s authority to review res judicata questions likely arises only where public policy is implicated by conflicting awards.

3.2. Res judicata as a jurisdictional problem?

Referring to res judicata challenges as admissibility objections is far from uniform, however. Courts, tribunals, and domestic legislation have also classified res judicata objections as challenges to the jurisdiction of a tribunal.

For instance, in AMCO v. Republic of Indonesia: Resubmitted Case, an ICSID tribunal explicitly classified the issue as one of jurisdiction when it answered a number of questions concerning res judicata principles in a Decision on Jurisdiction on 10 May 1988. The dispute arose from a contract between the claimant investor and respondent state to develop and manage a hotel complex in Indonesia. The first ICSID tribunal issued an award in favour of the claimant, with damages to be paid by respondent state. Marriott based its annulment argument on a number of grounds under section 1502 of the French Code of Civil Procedure. Marriott specifically raised a res judicata challenge under section 1502(1) of the Code, which allows annulment of an award where an arbitrator renders an award in the absence of an arbitration agreement or on the basis of a void or expired arbitration agreement. Marriott argued that the arbitration agreement had expired upon the award in the first arbitration and that JNAH was prevented from initiating new proceedings by the doctrine of res judicata.

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A third, and the largest, category of cases, awards, and laws does not expressly treat res judicata as either an admissibility or jurisdictional problem. Instead, these cases, awards, and laws view res judicata as a ‘bar’ to subsequent mitigation or as an issue that affects public policy.

For example, under Swedish law, if a party attempts to retry a claim that has already been decided, the claim is ‘res judicata’ and barred from subsequent reiteration. The reasoning for the bar is that once an arbitral award is rendered, an arbitration agreement is no longer valid in regard to that specific dispute. While this reasoning implies a jurisdictional problem, commentaries on Swedish arbitration practice do not expressly identify res judicata as an admissibility or jurisdictional problem, but rather as a ‘res judicata’ problem.

The unclear treatment of res judicata has also been seen in a number of arbitrations. For example, in the arbitrations between OME and Robert Lauder and the Czech Republic, the claimant initiated parallel arbitrations in London and Stockholm seeking to recover an investment in a Czech television license. The London tribunal rendered its award first. Seeking to avoid contradictory results in the Stockholm arbitration, the respondent argued that the Stockholm tribunal should respect the decisions that the London tribunal reached in its award. In the words of the respondent’s expert, the Stockholm Tribunal should defer to the doctrine of res judicata and end the proceedings since the London Tribunal has already rendered a decision on the matter. From the expert’s perspective, the previous determination of the matter necessitated an ‘end [to] the proceedings’ due to res judicata generally, but not explicitly because of an admissibility or jurisdictional problem.

The Swiss Federal Tribunal affirmed the principle of res judicata in another way—by not identifying the challenge as either an admissibility or jurisdictional problem, but rather as a public policy problem. For instance, in 2010, courts in both Switzerland and Hungary reviewed tribunals’ findings on res judicata objections and considered the public policy implications of the tribunals’ awards. In the Hungarian case, the Supreme Court held that arbitral awards have the same res judicata effect as ordinary court decisions, a provision not expressly granted by the Hungarian Arbitration Act but protected by the Hungarian Constitution. The Supreme Court held that when an ordinary court in Hungary is requested to review an arbitral tribunal’s application of res judicata, the court should review whether res judicata was properly applied by the tribunal. The Supreme Court reasoned that because res judicata is guaranteed by the Constitution, the principle implicates important public policy considerations.

Similarly, in the Swiss case, the Swiss Federal Tribunal framed a res judicata challenge as a public policy problem. The underlying dispute in that case centred on a Portuguese football player’s contract. The player terminated his contract with one football club, Benfica, and entered into a new contract with another, Atlético Madrid. The Fédération Internationale de Football Association (FIFA) granted Benfica’s compensation claim for the player’s training and promotion from Atlético Madrid. Atlético Madrid challenged the decision in the Commercial Court of Zurich, which invalidated the decision as a violation of European and Swiss competition laws. Benfica then sought a new decision from FIFA on the same matter, but FIFA rejected the claim. Benfica appealed FIFA’s rejection to the Court of Arbitration for Sports (CAS), which had recently been granted jurisdiction to review FIFA decisions. The CAS partially granted the appeal and ordered Atlético Madrid to compensate Benfica.

Atletico Madrid then challenged the CAS award in the Swiss Federal Tribunal on the grounds that the CAS award failed to consider the Zurich Commercial Court’s judgment and violated Swiss public policy. The Swiss Federal Tribunal affirmed the principle of res judicata and agreed that an arbitral award does violate Swiss public policy if it fails to consider the material legal effects of an earlier judgment or if the final award contradicts an opinion expressed in a preliminary award on a material issue. The Swiss Federal Tribunal limited the application of res judicata, however, to only the holding of the judgment and not the reasons.

The Swiss Federal Tribunal agreed with Atlético Madrid that the CAS award had improperly rejected the res judicata defence. Neither FIFA nor the CAS had the authority to review the decision made by the Zurich Commercial Court. Only a Swiss appellate court could review the decision, and no party had sought such an appeal. The Zurich Commercial Court’s decision, therefore, became final and binding and the same issue could not be reconsidered in any forum. The Swiss Federal Tribunal set aside the CAS award as a violation of Swiss procedural public policy.

In both the Hungarian and Swiss decisions, the courts did not consider admissibility or jurisdictional issues posed by the res judicata challenges. Similarly, in the CME Stockholm arbitration and under Swedish law, res judicata challenges do not expressly receive treatment as either admissibility or jurisdictional problems. Nonetheless, as the next section will demonstrate, even in systems where res judicata is not expressly an admissibility or jurisdictional issue, identifying it as such still has important consequences and is still possible.

4. Proposed Solution

As the above analysis shows, no matter what the express label of a res judicata challenge, one thing is consistent—that public policy is implicated by res judicata decisions. This section proposes that res judicata challenges should be treated as admissibility issues, which may implicate public policy concerns. Consequently, courts
at either the seat or place of enforcement should limit review of any such decisions to public policy concerns. This section will first do the following: (1) \[page 671\] explain why res judicata challenges should not be treated as jurisdictional objections. The section will then conclude (2) by explaining why ‘admissibility with public policy implications’ is the proper classification for these challenges.

4.1. Res judicata challenges should not be treated as jurisdictional objections

Res judicata challenges should not be treated as jurisdictional objections for logical, practical, and policy reasons. First, res judicata does not logically fit within the definition of jurisdiction. Recall that an objection to jurisdiction is an objection to the forum, whereas an objection to admissibility is an objection to the claim itself. \([149]\) If res judicata is classified as a jurisdictional problem, the real problem must be one of forum. \([149]\) The objection is that the arbitral tribunal that claims to be before is not the proper forum to resolve the dispute. A party raising a res judicata objection, however, is not merely attempting to get a dispute resolved in a different forum. \([146]\) Rather, the party does not want the claim to be resolved in any forum. The party alleges that because the dispute has already been resolved, it should not be reheard and resolved anywhere. Where the party is actually raising an issue with the claim itself, rather than the forum, the objection is one of admissibility and not of jurisdiction. \([144]\)

In addition to the logical problem, however, the practical problem of treating res judicata as a jurisdictional issue is that this treatment potentially allows parties to circumvent an important public policy concern of states. \([161]\) As the above analysis shows, whether res judicata is expressly called an admissibility or jurisdictional concern or not expressly called anything besides res judicata, courts, tribunals, and legislatures agree that the principle is meant to protect important public policy concerns – that a dispute should be resolved only once. \([151]\) Jurisdiction, at its core, comes down to a question of party consent. \([114]\) Did the parties consent to the tribunal’s jurisdiction to resolve the dispute? If res judicata is labelled a jurisdictional problem, then the problem is also labelled one of consent. In other words, the problem challenges whether the parties consented to resolve the dispute before a second tribunal.

If res judicata questions the existence of the parties’ consent, there could be a circumstance where the existence of that consent is found. In the international arbitration realm, where party consent is king, the parties could potentially consent to re arbitrate a dispute. For example, imagine a scenario where Company A and Company B resolve a contract dispute through arbitration and receive a final award. Neither party is initially happy with the award or the arbitration that produced it, and both intend to seek annulment of the award in court in the country of the seat of the arbitration. Company A and Company B, however, agree that rather than incur the time and expense of domestic court proceedings, they would simply prefer to re arbitrate the dispute. The two parties even sign a second arbitration agreement to confirm this agreement. Company A then reinitiates arbitration before a new tribunal. Company B, however, has second thoughts and decides it is happy with the first award and does not want to challenge the award or re arbitrate. Company B, therefore, lodges a timely jurisdictional objection before this second tribunal, alleging that the second arbitration is barred by the first award under res judicata. Company A, of course, puts forth the second arbitration agreement as proof of the parties’ consent to re arbitrate the dispute.

If res judicata is purely a jurisdictional problem, the second arbitral tribunal likely has jurisdiction over the dispute. \([151]\) The question is whether the parties consented for this tribunal to resolve this dispute. With the existence of the second arbitration agreement, the answer appears to be ‘yes’. If the parties are free to consent to such an agreement, then they are free to give jurisdiction to a tribunal to resolve a dispute that has already been decided. \([164]\) Labelling res judicata challenges \([152]\) as jurisdictional issues, therefore, could allow parties to consent to something that violates important public policy concerns. \([159]\)

Finally, treating res judicata as an issue of jurisdiction contradicts the prevailing trend in international arbitration for arbitrations to be increasingly independent from national courts. \([162]\) Domestic arbitration laws support this trend by limiting court involvement in arbitrations. For example, the UNCITRAL Model Law on International Commercial Arbitration \([144]\) states that ‘no court shall intervene except where so provided in this Law.’ \([150]\) The reason for this distance is that international parties choose international arbitration because it provides a neutral forum for parties to resolve their disputes. \([154]\) When parties have contractually agreed to settle a dispute in a private forum, subjecting that very dispute to judicial intervention contradicts the parties’ agreement and expectations. \([114]\) Of course, some judicial intervention is both required and demanded by arbitral parties to ensure fairness of the arbitral process. \([165]\) but many states have today restricted court intervention to issues of procedural irregularities or violations of public policy. \([165]\) In particular, the level of judicial involvement at the beginning of the arbitration is sometimes extremely restricted. \([163]\) Expanding judicial review over res judicata as a jurisdictional problem that can potentially bring court involvement at the beginning of the arbitration, especially when not logical or practical, does not sync with the developing trend of limiting judicial interference in international arbitrations. \([154]\) Moreover, if courts are in reality concerned with the public policy implications of res judicata problems, courts have the authority to review awards on this ground when a party resists enforcement or challenges an award. \([145]\)

In conclusion, neither logical, practical, nor policy reasons can justify treating res judicata objections as issues that affect the jurisdiction of an arbitral tribunal. \([166]\)

4.2. Res judicata challenges should be treated as admissibility objections with public policy implications
Logical, practical, and policy reasons lead to the conclusion that res judicata challenges should not be treated as jurisdictional problems, but logical, practical, and policy reasons also lead to the conclusion that res judicata challenges should be treated as admissibility problems with public policy implications.

First, logically, res judicata falls within the definition of an admissibility objection. When a party raises an admissibility objection, the party objects to the claim itself, asserting that the claim cannot be heard in any forum. This is precisely the objection that a party raises when it objects on res judicata grounds. The party claims that neither the specific arbitral tribunal nor another arbitral tribunal nor any court can decide the claim. Because the claim has been finally resolved once, no other body is competent to hear the claim again. The claim itself is the problem and cannot be admitted in any forum.

Second, res judicata objections practically fit within the scope of admissibility problems. Recall that the res judicata effect of a jurisdictional decision is likely limited in international arbitrations. That is, if arbitral tribunal A concludes that it lacks jurisdiction, arbitral tribunal B is not likely prohibited from conducting its own jurisdictional inquiry and ruling. Likewise, a finding by arbitral tribunal A that it has jurisdiction is not binding as res judicata on either a court or competent arbitral tribunal B, as the court is ultimately the final decision-maker on its own jurisdiction and an arbitral tribunal is authorized to determine its own jurisdiction under the principle of competence-competence. In other words, regardless of what arbitral tribunal A decides in regard to its own jurisdiction, neither a competent court nor subsequent arbitral tribunal is bound by arbitral tribunal A's finding under res judicata. Both the competent court and arbitral tribunal B may conduct a jurisdictional inquiry independently of what arbitral tribunal A has decided.

Similarly, an arbitral tribunal's decision on jurisdiction has no influence on the merits of the case. A tribunal that decides that it does not have jurisdiction makes no decision on the merits of the case. The merits of the dispute have therefore not been decided by a competent body yet. A negative finding of jurisdiction cannot prevent a subsequent competent body from rendering a decision on the merits. Likewise, a positive jurisdiction decision does not have res judicata effect on the merits of the case. If a tribunal decides it has jurisdiction, it still must conduct a separate inquiry to resolve the merits of the dispute. A jurisdictional finding by a tribunal, whether negative or positive, therefore has no res judicata effect on the determination of the merits of the dispute.

The same rationale leads to the practical conclusion that a decision on the merits does not have a res judicata effect on a subsequent court's or tribunal's jurisdiction. When a court or arbitral tribunal renders a decision on the merits of the dispute, res judicata prohibits a subsequent court or arbitral tribunal from conducting an independent inquiry into the merits of the dispute. Once the substantive dispute has been decided by the proper body, another body cannot decide that dispute. There can only be one proper body to decide a dispute. Once the proper body has resolved the dispute, neither the proper body nor any other body can decide the dispute. Resolution of the merits of the dispute means that the dispute is terminated. The dispute cannot be brought again in any forum, any jurisdiction, because the dispute no longer exists. The resolution of that dispute, however, does not affect the jurisdiction of a tribunal. A tribunal may have jurisdiction over other claims and disputes, even if it cannot admit an already settled dispute and rehear another claim.

Third and finally, res judicata fits within the scope of admissibility for policy reasons. Treating res judicata as an admissibility problem has the practical effect of limiting court review over the decision of an arbitral tribunal. As discussed above, modern arbitration laws seek to limit court intervention in the arbitral process. Institutional rules and party practice reflect this goal of limited court intervention as well. Identifying res judicata as an admissibility issue, therefore, fits squarely within this goal, as it limits the chance of a domestic court intervening in the arbitral process.

Recall that domestic courts always have the final say on an arbitral tribunal's jurisdiction. As a standard feature of modern arbitration laws, courts are empowered to conduct a full and independent inquiry into whether a tribunal has jurisdiction over a dispute, regardless of whether the tribunal has rendered a decision on jurisdiction or not. In contrast, a court is not empowered to conduct a full and independent review of admissibility issues. Treating res judicata as an admissibility issue creates more limited bases for a court to intervene, in line with the policy goals of states and institutions and desires of parties.

The limits on court review of admissibility problems also have their limits, however. Relevant specifically to res judicata is the public policy limit. As demonstrated in the analysis of case law and arbitral awards discussed above, courts and tribunals are often concerned with the public policy implications of enforcing an award or issuing an award that may contradict a prior award. Res judicata is a widely accepted legal concept because states have a public policy concern in the efficiency of their judiciaries in resolving disputes and the consistency of decisions in doing so. From the analysis of the cases and awards addressing res judicata challenges, this policy goal emerges as the primary goal of the courts, as opposed to conducting a strict jurisdictional inquiry.

Treating res judicata as an admissibility issue allows state courts to preserve this public policy concern while balancing the goals of limited court involvement in the arbitral process. Although often not expressed, jurisdictional challenges raise public policy concerns of their own. States, through their arbitration law, waive the sovereignty and jurisdiction of their courts by allowing parties to arbitrate disputes, but only in limited circumstances. When a court conducts a full and independent review of a tribunal's jurisdiction, the policy concern implicated is that the tribunal is operating under the specific and limited conditions that the state has
granted to parties to settle disputes outside of the exclusive jurisdiction of the domestic courts. If res judicata issues were treated as jurisdictional problems, this treatment would still require the court to conduct a separate public policy inquiry of an arbitral award, in addition to the typical jurisdictional concerns. This not only creates a system where res judicata decisions are always subject to court review but also one where the scope of the standard of jurisdictional review is expanded.

However, res judicata’s treatment as an admissibility issue keeps court intervention limited but allows courts to review res judicata challenges on public policy grounds. The grounds available to a party to challenge an award are limited under modern arbitration laws, but these laws do provide that an award may be set aside if the award violates public policy. Similarly, the New York Convention provides that courts may deny enforcement or recognition of an award where it violates public policy. As arbitral practice has demonstrated, courts often take a limited stance on the public policy grounds that warrant setting an award aside or denying recognition or enforcement. This demonstrates that even when certain public policy concerns are at stake, the public policy concern of limited judicial involvement in the arbitral process of finally settling disputes remains an important factor for domestic courts to consider. Res judicata is, therefore, properly identified as an admissibility issue because this treatment balances the important public policy considerations of states, as demonstrated in modern arbitration laws.

In summary, logical, practical, and policy reasons lead to the conclusion that res judicata rightly fits within the gambit of admissibility objections and not jurisdictional objections.

5. Conclusion

Res judicata is widely accepted as a basic feature of domestic and international legal systems, but wide acceptance of the concept has not led to a wide agreement on what the concept means. For example, understandings as to when res judicata may be invoked, who may invoke it, its scope, and its nature differ across common, civil, and international law systems. The uncertainty as to the definition of res judicata has further been demonstrated in international arbitration practice. Courts and arbitral tribunals are inconsistent, or more often vague, in how they define and resolve res judicata issues. While the terminology and rationale may be vague or lacking in these court decisions and awards, the logical, practical, and policy rationales behind the decisions and awards are not so divergent.

A res judicata objection strikes at a defect in the claim itself, rather than a defect in the impure forum. This understanding puts the objection within the definition of an admissibility problem. Moreover, practically, treating the objection as an admissibility problem helps foster the underlying procedural efficiency concern that res judicata as a concept strives to promote. Finally, treating res judicata as an admissibility problem complies with the scope of public policy concerns raised by the issue. In short, while the word choice and practice of tribunals and courts in addressing res judicata has not been clear, the treatment has been more uniform.

Res judicata is squarely an admissibility problem, and it cannot fit into the round hole of jurisdictional objections.

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See Peter Barnett, Res Judicata, Estoppel, and Foreign Judgments 8–9 (Oxford U. Press 2001) (explaining that the principle is “inherent in all judicial systems” and noting that the principle was recognized in ancient Hindu, Greek, and Roman legal systems) [hereinafter Barnett, Res Judicata, Estoppel, and Foreign Judgments]; Norah Gallagher, Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions, Peninsular Problems Int’l Arb. Arts. 355 (2006); ILA Interim Report, supra n. 1, at 2–7 (detailing the applications to applying res judicata in common law and civil law systems).

See Amco Asia Corp. and others v. Republic of Indonesia (Resubmitted Case), ICSID Case No. ARB/91/1, Decision on Jurisdiction, para. 30, 89 ILR 552, 560 (May 10, 1999) (recognizing the international principle that once a fact, question, or dispute has been finally resolved by a competent court that fact, question, or dispute cannot be retried).

See Gallagher, supra n. 3, at 336 (citing Bernard Hanotiau, Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues—An Analysis, 18 J. Intl Arb. 253, 357 (2001)). Res judicata applies to arbitral awards through court precedent in common law systems but is codified in the Civil Codes of many civil law systems. Compare Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1323–24 (2d Cir. 1977) ("It is equally clear that the doctrines of res judicata and collateral estoppel apply in New York proceedings", and...
Restatement (Second) of Judgments sec. 94(1) (2010) (stating that res judicata under US law applies equally to arbitral awards and to court decisions), with Nouveau code de procédure civile (N.C.P.C.), Art. 476 (Fr.) (the arbitral award, from the moment that it has been given, will become res judicata with respect to the dispute that it has determined.


IL A Interim Report, supra n. 1, at 2.


ILA Interim Report, supra n. 1, at 2.

See infra sec. II.B.1–3 (explaining the different approaches in the common and civil law systems).

See generally IALA Interim Report, supra n. 1 (examining divergent opinions on a variety of topics regarding res judicata under domestic and international legal systems and in international arbitration practice).

See Barnett, supra n. 2, at 9 (explaining that the English Court of Chancery first implemented the conclusive plea of res judicata in England), see also Fed. R. Civ. P. (including no express provision on res judicata for US civil procedures).

See Stavros Brekoulakis, The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited, 16 Am. Rev. Intl. Arts 177, 182–83 (2005) (comparing common law and civil law approaches to res judicata). While the English and US common law systems receive focus under this section, the approaches in other common law jurisdictions adopt similar views of res judicata. See IALA Interim Report, supra n. 1, at 16 (comparing the common law approaches in Ireland, Canada, India, Australia, New Zealand, and England).

See IALA Interim Report, supra n. 1, at 7 (explaining that review of the reasoning of an earlier judgment is often necessary where cause of action estoppel has been raised under English common law).

In England, claim preclusion is called ‘cause of action estoppel’ and issue preclusion is called ‘issue estoppel’. Barnett, supra n. 2, at 10. In the United States, claim preclusion is called ‘res judicata’ and issue preclusion is called ‘collateral estoppel’. See Burgess v. Hopkins, 14 F.3d 877, 876–83 (N.Y. 1994) (analysing res judicata and collateral estoppel as separate issues).

See IALA Interim Report, supra n. 1, at 7, 11 (explaining the British and US approaches).

See e.g. New Brunswick Ry. v. British & French Trust Corp. [1909] A.C. 1 (H.L.) [20] (Eng.) (applying ‘issue estoppel’ to prohibit re-litigation of an issue in a subsequent hearing); Restatement (Second) Judgments sec. 27 (applying ‘collateral estoppel’ to prevent the re-litigation of factual and legal issues already decided). US courts, however, link res judicata to claim preclusion and treat issue preclusion as a separate legal concept called collateral estoppel. See Burgess v. Hopkins, 14 F.3d 877, 876–83 (N.Y. 1994) (analysing res judicata and collateral estoppel as separate issues).

See IALA Interim Report, supra n. 1, at 7 (summarizing the British common law approach to preclusion).


The US approach to ‘issue preclusion’ differs from other common law jurisdictions, as US law allows third parties to rely on issues of fact or law finally decided in a prior proceeding even if the third party was not involved in the prior proceeding. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (holding that ‘offensive’ collateral estoppel is allowed where a party could not have ‘easily joined the earlier action or where...the application of offensive collateral estoppel would [not] be unfair to a defendant.’)

See Fidelitas Shipping Co. v. V/O Exportchleb [1966] 1 Q.B. 630 (Eng.) (‘Issue estoppel applies to arbitration as it does in litigation’); IALA Interim Report, supra n. 1, at 10–12 (summarizing the approaches of other common law jurisdictions).

See Peter Schlosser, Arbitral Tribunals or State Courts: Who Must Decide to Which? 15 A.S.A. Special Series 21 (2001), ‘Nowhere in a statute of a common law country is it stated that an arbitral award has no res judicata effect like a judgment.’

21 Ibid.


33. See Breckoulakis, supra n. 12, at 163 (stating that codified res judicata in civil law systems is limited to claims resolved by the judgment); IALA Intern Report, supra n. 1, at 13–14 (explaining that there is no idea of issue estoppel or preclusion in civil law countries).

34. See supra IALA Intern Report, supra n. 1, at 15 (summarizing the civil laws on this point).

35. Ibid. at 14.

36. Ibid. at 15–16.

37. See supra supra Vought Law, Res Judicata and the Rule of Law in International Arbitration, 8 African J. Intl. & Comp. L. 38, 40 (1996) (stating that this factor goes to the ‘very essence of res judicata’); IALA Intern Report, supra n. 1, at 16 (explaining that this requirement is applied narrowly under French law).

38. IALA Intern Report, supra n. 1, at 16.

39. Ibid. Note, however, that identical party bears no universally agreed definition within civil law countries. See ibid. (noting the different approaches in French, Italian, and Belgian Civil Codes).

40. See ibid. at 16–17 (explaining the French, Belgian, Dutch, German, Swiss, Italian, Swedish, Danish, Spanish, and Egyptian laws).

41. Scholarship on res judicata supports this statement. See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 336 (Cambridge U. Press 1953), 'There seems little, if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings.' Lowe, supra n. 27, at 39. Res judicata is also a general principle of international law, albeit one which has attracted relatively little attention. Reinisch, supra n. 5, at 44. Doubts about the existence of res judicata as a rule of international law seem to be unfounded.’ IALA Intern Report, supra n. 1, at 18. ‘It is widely accepted that res judicata is also a rule of international law.’

42. For a few examples from the International Court of Justice (ICJ), see Request for Interpretation of the Judgment of June 11, 1948 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), 1949 I.C.J. 31, 39 (March 25) (recognizing the ‘primacy of the principle of res judicata’; South West Africa, Second Phase (Ethiopia/Libya v. S. Afr.), Judgment, 1989 I.C.J. 6 (July 10) (evaluating the scope of res judicata in international law); Arbitral Award Made by the King of Spain on Dec. 23, 1906 (Honduras v. Nicor.), Merits, Judgment, 1990 I.C.J. 192, para. 5 (Nov. 18) (recognizing res judicata); Effect of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 59 (July 13) (recognizing res judicata as a ‘well-established’ principle of law). For an example from the European Court of Justice (ECJ), see Case 140/84, Emilia Gustavo v. High Auth. of the European Coal & Steel Cmty., 1985 E.C.R. 51, 58 (recognizing the application of res judicata when a matter has already been decided by the court).

43. See Waste Mgmt. Inc. v. Mexico, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection Concerning the Previous Proceedings, para. 26, 6 ICSID Rep. 549 (June 26, 2000) (hereinafter Waste Management I). There is no doubt that res judicata is a principle of international law. Amco v. Republic of Indonesia, supra n. 3, para. 26, 69 I.L.R. R. 562, 560 ‘The principle of res judicata is a general principle of law.’ The Piaus Fund of Califomia (U.S. v. Mex.), Hague Ct. Rep. (Scot) 1, 5 (Perm. Ct. Arb 1990) (explaining that res judicata applies ‘not only to the judgments of tribunals created by the State, but equally to arbitral awards’).

44. Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow (Germ. v. Poland), 1927 P.C.I.J. (Ser. A) No. 11, at 27 (Dec. 16). The significance of this statement is that Art. 38(1) of the Statute of the International Court of Justice, which defines sources of international law, states that ‘the general principles of law recognized by civilized nations’ are primary sources of international law. United Nations, Statute of the International Court of Justice, Art. 38(1) (Apr. 18, 1945).

45. See supra supra IALA Intern Report, supra n. 1, at 19, f. 120 (explaining that three of the four criteria were also confirmed by the tribunal in SME Czech Republic B.V. v. Czech Republic, Final Award and Separate Opinion para. 435 (Ad Hoc UNCITRAL Arbitration Rules 2003), available at www.investmentclaims.com/newpdf/11aawards/lawic-62-2003.pdf.

46. See supra supra sec. II.B.2.

47. See Ian Brownlie, Principles of Public International Law 50, 8th ed., (Oxford U. Press 2003). ‘There is no effect of res judicata from the decision of a municipal court so far as an international jurisdiction is concerned. Decisions or awards issued by tribunals established by treaties and mixed arbitration tribunals do carry res judicata effect, however, under international law. See supra supra IALA Intern Report, supra n. 1, at 19 (citing Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001 I.C.J. 40 (Mar. 16).

48. See International Chamber of Commerce, Rules of Arbitration Art. 34(6) (2012), ‘Every award shall be binding on the parties...the parties undertake to carry out the award without delay.’ Arbitration Institute of Stockholm Chamber of Commerce, Arbitration Rules, Art. 40 (2010), ‘An award shall be final and binding on the parties when rendered...the parties undertake to carry out any award without delay.’ London Court of International Arbitration, Arbitration Rules, Art. 26.9 (1998). All awards shall be final and binding on the parties...the parties undertake to carry out any award immediately and without any delay.’ UNCITRAL, Arbitration Rules, Art. 34(2) (2010), ‘All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.’ American Arbitration Association, International Dispute Resolution Procedures, Art. 27(1) (2000), ‘Awards shall be...final and binding on the parties. The parties undertake to carry out any such award without delay.’


A tribunal renders a ‘negative jurisdiction’ award where it finds it lacks jurisdiction and terminates the arbitral proceedings. See Simon Greenberg & Matthew Secomb, Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia, 19 Arb. Int’l 125, 131 (2002) (explaining that the competence-competence principle allows a tribunal to find that it lacks jurisdiction). Many domestic arbitration laws, including the UNCITRAL Model Arbitration Law, supra n. 7, and arbitral institutions’ rules are silent on the effect of a decision of negative jurisdiction. But see P. Sanders, Quo Vadis Arbitration? Sixty Years of Arbitration Practice: a Comparative Study 186–67 (Kouzer L. Int. 1999) (stating that negative jurisdictional decisions are not ‘awards’ under the New York Convention). The few legislations that address negative jurisdiction decisions disagree on whether these decisions should be issued as ‘awards’ or ‘rulings’, whether such findings have binding force, and whether such findings are appealable. See Singapore Academy of Law, Report of the Law-Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings A-1-A-4 (2011), available at www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/32/LRC%20on%20Right%20of%20Judicial%20Review%20of%20Negative%20Jurisdictional%20Decisions%20Part%20I.pdf (summarizing the different approaches taken by jurisdictions).

Compare Code Judicaire (C.Jud.), Art. 1697(3) (Belg.), ‘The judicial authority may at the request of one of the parties decide whether a ruling that the arbitral tribunal has no jurisdiction is well founded.’ (translation); Svensk författningssamling [SFS] 1999:116 [Swedish Arbitration Act] 4: 271(1) (mandating that arbitrators issue an award even when terminating proceedings without deciding issues referred to the arbitrators); Schweizerisches Bundesgesetz über das Internationales Privatrecht [IPRG] [Federal Statute on Private International Law] Dec. 18, 1987, Arts. 198, 198 (establishing that the tribunal may rule on its own jurisdiction but providing that a wrong decision to accept or deny jurisdiction may be annulled (Switz.), with Zivilprozessordnung [ZPO] [Code of Civil Procedure], Dec. 5, 2000, Bundesgesetzblatt [BGBl] 2002, as amended, sec. 1046 (Ger.) (limiting court review to positive jurisdiction findings); Hong Kong Arbitration Ordinance (2011) Cap. 609, 1, sec. 34(4) (prohibiting judicial review of negative jurisdictional decisions). See Waste Management II, supra n. 33, para. 43 n. 44 (quoting the Trail Smelter arbitration, 35 A.J.L.L 864, 702 (1941), ‘a decision merely denying jurisdiction can never constitute res judicata as regards the merits of the case at issue.’) The res judicata effect of a jurisdictional award or decision on subsequent jurisdictional challenges is generally unclear. For example, if a tribunal finds that it lacks jurisdiction because it was improperly constituted as required by an arbitration agreement, a subsequent properly appointed tribunal could likely have jurisdiction and the prior negative jurisdictional finding would have no res judicata effect. In contrast, if a tribunal finds that it lacks jurisdiction because of a defective arbitration agreement, such a finding could have res judicata effect on a subsequent tribunal.

The problem with determining the res judicata effect of a negative jurisdictional decision due to a defective arbitration agreement arises from the possible overlapping competence of multiple tribunals and courts to determine jurisdiction. See Christfer Söderland, Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings, 22 J. Intl. Arb. 301, 304–5 (2005) (explaining that only one court or tribunal is ultimately competent to resolve a dispute). This overlapping competence develops from the principle of competence-competence and from the court having the final authority to determine a tribunal’s jurisdiction. See William W. Park, The Arbitrability Delta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz has Crossed the Atlantic? 12 Arb. Int’l 137, 148-50 (1996) (explaining how competence-competence is applied in different legal systems). Under competence-competence, each tribunal is empowered to determine whether it has jurisdiction to decide a dispute. See ibid. In some cases, two tribunals may both have jurisdiction over a dispute or differing lex arbitrarii may render an arbitration invalid at one seat but valid at another. Additionally, an arbitral tribunal’s jurisdictional decision is subject to ultimate review by a court at the seat of arbitration and, in some cases, the court at the place of enforcement. See Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Govt of Pakistan, (2010) U.K.S.C. 46, para. 68 (Eng.) (refusing to enforce the award while challenge proceedings were still ongoing, due to a lack of jurisdiction over the respondent state). Accordingly, due to the overlapping competence of tribunals to determine their own jurisdiction and of courts to issue the final decision on jurisdiction, it is not clear what res judicata effect a finding of jurisdiction by one arbitral tribunal has on another arbitral tribunal.

North American Free Trade Agreement, Art. 1121, Dec. 17, 1992, 32 I.L.M. 656 (requiring that “[a] disputing investor may submit a claim...to arbitration only if...[b] the investor...waive[s] [its] right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Art. 1116). See Waste Management II, supra n. 33, at paras. 38-47 (rejecting Mexico’s defence on this point).

See Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/89/2, Award and Dissenting Opinion, 40 I.L.M. 56, 80 (June 2, 2000) [hereinafter Waste Management I] (dissent) (disagreeing with the majority’s opinion that waiver is a jurisdictional issue), see generally Jan Paulsson, Jurisdiction and Admissibility, Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner 615 (2005) (discussing the problems tribunals encounter in determining whether an issue goes to admissibility or jurisdiction).

Paulsson, supra n. 48, at 616. See Park, supra n. 45, at 138 (explaining the differences between public and private dispute resolution).

See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942
that a party may raise jurisdictional challenges to the tribunal or 
will vary depending on the jurisdiction, however. 

have the final decision on admissibility issues). 

for denying recognition and enforcement of an arbitral award); 
Paulsson, supra n. 48, at 615 (accusing A.S. Rau, Everything You Really Need to Know About 'Separability in Seventeen Simple Propositions, 14 Am. Rev. Int'l Arb. 1 (2003)). 

See ibid. at 615-616 (referring to this basic question as the 'Yodesta'). Rau, supra n. 55, at 70. 
Paulsson, supra n. 48, at 616. 
Nota, supra n. 54, at 32. 
Paulsson, supra n. 48, at 616-617. 
See ibid. at 616. 
See Nota, supra n. 54, at 32. 
See ibid. 

Lack of jurisdiction is a challenge that a tribunal may consider upon its own initiative or upon party request. (Ibid. at 32. 

Inadmissibility, however, is a challenge normally raised by the parties. 

Objections to admissibility generally are necessary to resolve only after a determination on jurisdiction is made. (Ibid. at 33. 

The law that governs jurisdictional objections is that which applies to interpreting the instrument in which consent to arbitrate is contained or the law that governs the arbitration itself, the lex arbitri. Compare Nigel Blackaby, Constantine Partasides et al., Northern and Hunter on International Arbitration 166–73 (Wolters Kluwer 2009) (stating that the law governing the agreement to arbitrate is the law chosen by the parties or the law applicable to the merits and that the law governing the arbitration itself is derived from the seat), with Nota, supra n. 54, at 33 (explaining that admissibility objections are governed by principles and rules binding on the parties for the particular dispute). 

For the limits of res judicata's application to decisions on jurisdiction, see supra nn. 44-47 and accompanying text; see also Nota, supra n. 54, at 33 (noting that determinations of admissibility problems do not carry full res judicata effect because the defects can be cured). But see I.A Intern Report, supra n. 1, at 26 (explaining that an award on jurisdiction does not have a res judicata effect under common law systems); Waste Management v, supra n. 33, at para. 43 n. 44 (making clear that any res judicata effect that a jurisdictional decision has is limited to that specific jurisdictional question and does not preclude a determination on the merits of the dispute). 

Nota, supra n. 54, at 32. 
Ibid.; see Paulsson, supra n. 48, at 601 (arguing that decisions by tribunals with jurisdiction should be final); Blackaby, Partasides et al., supra n. 65, at 351 'Any decision given by an arbitral tribunal as to its jurisdiction is subject to control by the courts of law, which in this respect have the final word.' One notable exception to this general rule exists in disputes settled under the International Centre for Settlement of Investment Disputes (ICSIID) regime. Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (henceforth Washington Convention), an internal annulment process reviews all challenges to awards, including jurisdictional challenges, and appeal to domestic courts is not allowed. ICSIID Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Art. 52 (April 2006). 
See Albert Jan van den Berg ed., Sojurfreightexport v. Joc Oil Ltd., 15 Y.B. Commercial Arb. 31 (1990) (containing a summary of the decision by the Bermuda Court of Appeal on enforcement of a U.S.S.R. arbitral award where the court affirmed the doctrine of competence-competence); Blackaby, Partasides et al., supra n. 65, at 346-348 (explaining that an arbitral tribunal has an inherent authority to decide on its own jurisdiction). 

See Blackaby, Partasides et al., supra n. 65, at 350 (stating that an arbitral tribunal's decision on jurisdiction is subject to a final review by the courts). 

See Julian M. Lew, Loukas A. Mistelis et al., Comparative International Arbitration 336 (Kluwer L. Int. 2003) (stating that a tribunal's jurisdiction decision is open to full review by the courts); see also LG Caltex Gas Co. v. China Naf Petroleum Co. [2001] E.W.C.A. Civ. 788 (Eng.) (finding that parties must be explicitly clear if they wish to grant the tribunal the final decision on its jurisdiction and remove the final decision from the courts). 

See Lew, Mistelis et al., supra n. 71, at 336 (explaining that courts may only review merits decisions for public policy issues); Paulsson, supra n. 48, at 617 (concluding that tribunals have the final decision on admissibility issues). 


See Paulsson, supra n. 48, at 617 (concluding that tribunals have the final decision on admissibility issues). 

New York Convention, supra n. 7, Art. 2(3). 

The court's level and extent of review at this preliminary stage will vary depending on the jurisdiction, however. See Lew, Mistelis et al., supra n. 71, at 361 (comparing the French, German and English approaches). 

See Blackaby, Partasides et al., supra n. 65, at 355 (explaining that a party may raise jurisdictional challenges to the tribunal or
national courts at the beginning of the arbitration or by challenging the award at the conclusion of the arbitration.

78 See Paulsson, supra n. 46, at 608-609 (reviewing the SGS v. Pakistan decision on jurisdiction and explaining that only Pakistan, the respondent, could have challenged the tribunal's finding since the tribunal asserted jurisdiction).

79 See Nata, supra n. 54, at 32-33 (explaining that admissibility challenges made only be decided once jurisdiction is found).

80 Ibid.

81 See infra sec. III.

82 See ibid.

83 See Paulsson, supra n. 46, at 605 (cautioning that national governments can no longer ignore the desirability of harmonization in international arbitration cases).

84 See infra sec. IV (proposing a solution to the problem).


86 See, e.g., Chiron Corp., 207 F.3d, Mement Int’l Hotels, no. 09/13559 (rejecting a party’s request that res judicata objections be reviewed by the courts as jurisdictional challenges). Nat’l Union Fire Ins. v. Belco Petroleum Corp., 88 F.3d 125 (2d Cir. 1996); Gallard & Savage, supra n. 52, at 779 (explaining that res judicata challenges are treated as admissibility objections under French law).

87 Chiron Corp., supra n. 85.

88 Ibid.

89 See supra sec. II.B.2 (describing the difference between jurisdictional and admissibility objections).

90 no. 09/13559.


92 Ibid.

93 See James Clark, Res Judicata: A Question of Admissibility to be Determined by the Tribunal, Practicallaw.com (Nov. 3, 2010), available at http://us.practicallaw.com/7-503-8180 (summarizing the background of the case).

94 Ibid.

95 Ibid.

96 Ibid.

97 Nouveau code de procédure civile [N.C.P.C.], Art. 1502 (Fr.).

98 Nouveau code de procédure civile [N.C.P.C.], Art. 1502(1) (Fr.).

99 Clark, supra n. 93.


101 Ibid.

102 Ibid.

103 Ibid.

104 Ibid.

105 Amico v. Republic of Indonesia, supra n. 3, at 89 I.L.R. 552, 566.

106 Ibid., para. 2.

107 Ibid., para. 4.

108 The Ad Hoc Annulment Committee annulled the ‘whole’ award but with ‘qualifications’; ibid. para. 10. For the second tribunal’s determination of what was and was not annulled, see ibid. paras. 8–15.

109 Ibid., paras. 16-18.

110 Ibid.

111 Ibid., para. 54.

112 Ibid., para. 53.

113 Ibid., para. 83.

114 Ibid., para. 88.

115 Ibid., para. 92.

116 Ibid., para. 98.

117 Ibid., para. 17 (emphasis added).


119 See Lars Heuman, Arbitration Law of Sweden Practice and Procedure 120 (Juris Publishing Inc., 2003) (explaining that under Swedish law, an arbitration agreement is no longer operative for a specific issue when the award on that issue is rendered).

120 Ibid.


122 Lauter, Final Award in the Matter of an UNCITRAL Arbitration.


124 Ibid.

125 Lagfeldßblott Bintzold (LB) [Supreme Court] BH.2010.191 (Hung.). Tribunale federale (TF) [Federal Tribunal], Apr. 23, 2010, 4A 890/2009 (Switz.).


127 Ibid. at 276.

128 Ibid.

129 Tribunale federale (TF) [Federal Tribunal], Apr. 23, 2010, 4A 890/2009 (Switz.). An English translation of this case is available at ZPG, ‘Setting aside of award for violation of public policy principle’, www.practicallaw.com/setting-aside-of-award-for-violation-of-public-policy-principle-

130 ZPG, supra n. 129.
is advocated in the 1961 European Convention and under Swiss law, unless the arbitration agreement is patently void; decline jurisdiction even if the merits are not before the tribunal, Jaguar France v. Renault Appeal [Paris, Dec. 7, 1994, 1996 Rev. Arb. 245 (V 2000, formerly amended its judicial code in 1998 to allow limited judicial review of the seat for international arbitrations, however, and ultimately eliminated judicial review of arbitral awards). Belgium experienced scrutiny of an arbitral award if none of the parties was a national or interest are at stake). Parties are only allowed to arbitrate disputes that are 'arbitrable' under the applicable law. See Born (2009), supra n. 51, at 709 (distinguishing the limits of arbitrability from substantive validity of an arbitration agreement). These limits on arbitrability are normally set out in arbitration laws, however, whereas challenges based on public policy concerns are invoked when the award is challenged at the end of the proceedings. Compare Svensk Författningssamling [SFS 1958:116] (Swedish Arbitration Act) 1:1 (1:1) 'Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution', with New York Convention, supra n. 7, Art. V(2)(b) (stating that an award may be refused enforcement on public policy grounds). Of course, a court may refuse to enforce a later award that violates public policy. See New York Convention, supra n. 7, Art. V(2)(b) (stating that an award may be refused enforcement if 'the recognition or enforcement of the award would be contrary to the public policy of that country'). See Blackaby, Partasides et al., supra n. 65, at 440 (stating that the arbitral process has distanced itself from the risk of domestic judicial involvement, especially where international trade interests are at stake). See UNCITRAL, Status: 1985 UNICTRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed July 18, 2011) (listing the countries that have enacted the UNCITRAL Model Law on International Commercial Arbitration). UNCITRAL Model Arbitration Law, supra n. 7, Art. 5 (2006). See Born (2009), supra n. 51, at 417 (explaining the advantages of resolving disputes in a forum detached from both parties' home courts). See Hossein Abedian, Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficient System of Judicial Review, 28 J. Intl. Arb. 553 (2011) (reasoning that reference to arbitration presumably excludes court intervention). See ibid (explaining that the debate surrounding judicial intervention in international arbitrations arises from the clash between finality of the award and fairness in the proceeding). Experience has shown that users of arbitration want some level of judicial review in arbitration. For example, in 1985, in an effort to attract international businessmen to select Belgium as the seat of arbitrations, Belgium introduced legislation that prohibited judicial scrutiny of an arbitral award if none of the parties was a national or resident of Belgium. See ibid at 563 (describing why Belgium eliminated judicial review of arbitral awards). Belgium experienced the unexpected result of a decline in parties choosing Belgium as the seat for international arbitrations, however, and ultimately amended its judicial code in 1998 to allow limited judicial review of arbitral awards. Code Judiciaire [C.Jud.], Art. 1704 (Belg.). Abedian, supra n. 190, at 556-557. See, e.g., Nouveau code de procédure civile (N.C.P.C.), Art. 1458 (Fr.) (stating that the court will decline jurisdiction under French law where an arbitration agreement exists if the merits are already before the tribunal); Cour d'appel (CA) [regional Court of Appeal] Paris, Dec. 7, 1994, 1996 Rev. Arb. 245 (V 2000, formerly Jaguar France v. Renault (explaining that French courts will also decline jurisdiction even if the merits are not before the tribunal, unless the arbitration agreement is patently void; see also Gaillard & Savage, supra n. 52, at 468-470 (explaining that a similar approach is advocated in the 1961 European Convention and under Swiss law).
164 See Gaillard & Savage, supra n. 52, at 137 (explaining that the French approach is gaining international acceptance).

165 See New York Convention, supra n. 7, Art. II(2)(b). "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that...the recognition or enforcement of the award would be contrary to the public policy of that country,' UNCITRAL Model Arbitration Law, supra n. 7, Art. 34(2)(b)(ii) (2006). An arbitral award may be set aside by the court...only if...the party making the application furnishes proof that...the award is in conflict with the public policy of this State.

166 However, this conclusion is made with one exception. Res judicata would implicate a jurisdictional problem in cases where a dispute has already been decided in a court in a country other than the seat of the arbitration. While the resisting party could likely raise a res judicata challenge in a subsequent arbitration as to the merits of the dispute, the threshold issue that needs to be resolved before the res judicata objection can be addressed is who was/is the competent authority to hear the dispute. In other words, before proceeding to determine whether the second case is barred on the merits by res judicata, the arbitral tribunal first must determine whether or if the court in the non-seat country had jurisdiction to decide the dispute. If the prior court was the competent body to try the dispute, the arbitral tribunal has no jurisdiction and need not resolve the res judicata challenge. However, if the prior court did not have the authority to resolve the dispute, the prior judgment of that court may not have res judicata effect over the actual properly authorized body, the arbitral tribunal. In this situation, res judicata would implicate a jurisdictional concern. Nonetheless, the jurisdictional issue would have to be resolved first and separately from the actual res judicata challenge on the merits of the dispute.

167 See Paulsson, supra n. 48, at 676 (explaining that jurisdictional objections take issue with the forum, while admissibility objections take issue with the claim); see also supra sec. II.B.1 (summarizing the difference between jurisdictional and admissibility objections).

168 See supra sec. II.A.4 (explaining that a jurisdictional decision has no res judicata effect on the merits of the underlying dispute).

169 See ibid. (explaining why negative jurisdiction decisions do not have res judicata effect.)

170 See Gaillard & Savage, supra n. 52, at 389–400 (clarifying that competence-competence does not prevent courts from having the final decision on a tribunal's jurisdiction).

171 Practically, many tribunals decide issues of jurisdiction and merits together in a final award, as the decisions on jurisdiction can be closely tied to the legal issues on the merits as well. See e.g. Internum Award in Case No. 7309 of 1995, 26 Y B. Commercial Arb., 311, 322 (2000) (concluding that the tribunal could not make a final decision on jurisdiction at a preliminary stage of the arbitration proceedings); Born (2009), supra n. 51, at 969 (explaining that tribunals can exercise their judgment to decide the jurisdiction and merits issues separately or together, considering the complexity of the case and the parties' desires).

172 See supra sec. II.A.4 (explaining negative jurisdiction).

173 See ibid. (discussing the scope and applicability of res judicata in international arbitration).

174 See, e.g., UNCITRAL Model Arbitration Law, supra n. 7, Art. 5, ‘In matters governed by this Law, no court shall intervene except where so provided in this Law.’

175 One example of this from party practice is the use of exclusion agreements, in which parties agree that courts will have no review over the final award. See Jennifer Kirby, Finality and Arbitral Rules: Saying an Award is Final Does Not Necessarily Make It So, 29 J. Int'l Arb., 119, 125 (2012) (explaining exclusion agreements and giving examples of jurisdictions in which they are permitted); see also if neither party has a domicile, a place of habitual residence, or a place of business in Switzerland, they may, by an express declaration in the arbitration agreement or in a subsequent written agreement, exclude all appeals against the award of the arbitral tribunal. They may also exclude an appeal only on one or several of the grounds enumerated [the PIL].

176 See Baker & McKenzie 2010–2011, supra n. 91, at 231 (summarizing the French appellate case, where the court refused to review the tribunal's res judicata decision on admissibility).

177 See Gaillard & Savage, supra n. 52, at 389–400 (clarifying that competence-competence does not prevent courts from having the final decision on a tribunal's jurisdiction).

178 Ibid.

179 See supra n. 68 and accompanying text (explaining when decisions of tribunals are and are not reviewable by courts).

180 See supra sec. IV.A (summarizing this trend).

181 See Tribunale federale (TP) [Federal Tribunal], Apr. 23, 2010, 4A, 490/2009 sec. 2.1 (Switz.) (characterizing res judicata as implicating Swiss procedural public policy); Baker & McKenzie 2010–2011, supra n. 51, at 231 (summarizing the French appellate decision that stated that res judicata implicates public policy); ibid. at 276 (summarizing the Hungarian Supreme Court decision that stated that res judicata implicates public policy).

182 See IIA Internum Report, supra n. 1, at 3 (explaining the dual policy rationale behind res judicata).

183 See Born (2009), supra n. 53, at 60 (elaborating that an arbitration agreement only has a binding effect as far as it is supported by the legal framework of international treaties and domestic laws).

184 See, e.g., Sveriges forfattningsministeriet [SFS 1999:116] (Swedish Arbitration Act) S:382 (stating that an award is invalid under Swedish law if the award 'is clearly incompatible with the basic principles of the Swedish legal system'); UNCITRAL Model Arbitration Law, supra n. 7, Art. 34(2)(b)(ii), 'An arbitral award may be set aside by the court...only if...the party making the application furnishes proof that...the award is in conflict with the public policy of this State.'


186 See Blackaby, Papadimitriou et al., supra n. 65, at 613–14 (explaining that many courts consider "fundamental legal principles", as opposed to purely domestic interests, when confronted with a public policy challenge and that France applies an even higher standard of international public policy.)

187 See supra sec. II (explaining the differences between the common, civil, and international law approaches to res judicata).
See supra sec. III (analysing the differing treatments of res judicata by courts, legislations, and tribunals).